(2)

No. 03-960

Supreme Court, U.S.
FILED
APR 7 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GROSS SEED COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND NEBRASKA DEPARTMENT OF ROADS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS, NEBRASKA DEPARTMENT OF ROADS AND JOHN L. CRAIG, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J.L. SPRAY
STEPHEN D. MOSSMAN*
Special Assistant Nebraska Attorneys General
MATTSON, RICKETTS, DAVIES, STEWART & CALKINS
134 South 13th Street, Suite 1200
Lincoln, NE 68508
(402) 475-8433

**Counsel of Record*

JEFFERY T. SCHROEDER
Nebraska Assistant Attorney General
1500 Highway 2
P.O. Box 94759
Lincoln, NE 68509-4759
(402) 479-4611

Counsel for Respondents Nebraska Department of Roads and John L. Craig

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Congress in enacting the Transportation Equity Act for the 21st Century had a strong basis in evidence to authorize and require a 50-state program of racial and gender preferences as a putative remedy for discrimination in public contracting?

2. Whether the Disadvantaged Business Enterprise ("DBE") program of the United States Department of Transportation ("DOT") – which discriminates on the basis of race and gender in connection with the federal funding of highway construction contracts let by states – is narrowly tailored to further a compelling interest?

3. Whether Nebraska's DBE program which was required by DOT's DBE regulations and approved by DOT, satisfies strict scrutiny?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Gross Seed Company was the plaintiff-appellant in the court below. Respondents Nebraska Department of Roads; John L. Craig, in his capacity as the Director of the Nebraska Department of Roads; United States Department of Transportation; Federal Highway Administration; and the United States, were the defendants-appellees in the court below.

Respondent Nebraska Department of Roads is an administrative agency of the State of Nebraska, and as such has no parent corporations, and no publicly-held company owns 10 percent or more of its stock. John L. Craig is a defendant solely in his capacity as a Director of the Nebraska Department of Roads.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
I. GROSS SEED'S CLAIM FOR FORWARD-LOOKING RELIEF SHOULD BE DENIED BECAUSE IT CHALLENGES A FISCAL YEAR 2001 NEBRASKA DBE PROGRAM UNDER TEA-21 WHICH EXPIRED BY ITS OWN TERMS IN FEDERAL FISCAL YEAR 2003	6
II. CONTRARY TO GROSS SEED'S ASSERTIONS, THERE IS NOT A SPLIT, BUT RATHER UNANIMITY IN THE CIRCUITS	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES:

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 12

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) 10

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), *cert. granted*, 532 U.S. 941, *writ dismissed*, 534 U.S. 103 (2001) 11

Braxton v. United States, 500 U.S. 344 (1991) 10

Grutter v. Bollinger, 123 S.Ct. 2325 (2003) 7

Rothe Development Corp. v. United States Department of Defense, 262 F.3d 1306 (Fed.Cir. 2001) 10, 11

United States v. Paradise, 480 U.S. 149 (1987) 4

STATUTORY PROVISIONS:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

National Defense Authorization Act of 1987, § 1207, Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986) 10

Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, HR 3850, February 29, 2004, 118 Stat. 478 (2004) 7

Transportation and Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) 1

TABLE OF AUTHORITIES – Continued

Page

REGULATORY PROVISIONS:

Participation by Disadvantaged Business Enterprises in Department of Transportation Programs; Final Rule, Federal Register, Vol. 64, No. 21, p. 5096-5148, February 2, 1999 6

49 C.F.R. Part 26 ..... 1, 5, 6, 8, 12

49 C.F.R. Part 26.45 7

49 C.F.R. Part 26.51(c)-(g) 8

SUPREME COURT RULES:

Rule 10 ..... 9, 12

Rule 15.2 5

OPINIONS BELOW

The Opinion of the Eighth Circuit is reported at 345 F.3d 964 (2003) and reproduced in the Petitioners' Appendix at 1a. The Opinion of the District Court for the District of Nebraska is unreported and reproduced in the Petitioners' Appendix at 15a.

JURISDICTION

The Judgment of the Eighth Circuit was entered on October 6, 2003. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves a set of federal statutes and regulations that constitute the Disadvantaged Business Enterprise ("DBE") program of the U.S. Department of Transportation ("DOT") and the Federal Highway Administration ("FHWA").

The DBE program was authorized by the Transportation and Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) ("TEA-21"), established by 49 C.F.R. Part 26 and administered in part by the State of Nebraska Department of Roads through its Director John L. Craig (collectively "NDOR"). Gross Seed challenged the DBE program, both facially and as applied, alleging that it violated its rights to equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The DBE program established by the Federal Government requires NDOR to set an overall DBE goal. On a limited number of federal aid contracts, contractors must use good faith efforts to award a certain percentage of subcontracts to "socially and economically disadvantaged" businesses. Gross Seed is not a certified DBE and complains of the implementation of the DBE program by NDOR. The Eighth Circuit Court of Appeals, like the District Court, rejected Gross Seed's challenge following a thorough review.

1. NEBRASKA'S IMPLEMENTATION OF THE FEDERAL DBE PROGRAM.

NDOR was mandated by DOT and FHWA to implement a DBE program. As set forth in facts accepted by the Eighth Circuit and not excepted to by Gross Seed, NDOR commissioned MGT of America, Inc. ("MGT") to conduct availability and capability studies of DBE firms in the Nebraska highway construction market. The study was to aid NDOR in implementing the revised Federal DBE program. The availability study found that between 1995 and 1999 when Nebraska followed the mandatory ten percent set-aside requirement, 9.59 percent of all available and capable firms were DBEs and DBE firms received 12.67 percent of the contract dollars on federally-assisted projects. MGT recommended that NDOR set an overall Fiscal Year 2001 DBE participation bill of 9.95 percent and set the race- and gender-conscious part of the goal at 4.82 percent. NDOR adopted MGT's recommendations in its submission to DOT for Fiscal Year 2001. DOT approved NDOR's program for Fiscal Year 2001. For Fiscal Year 2001, NDOR required prime contractors to make a good

faith effort to allocate a set portion of each contract's funds to DBE sub-contractors. Pet. App. at 14a.

2. THE DISTRICT COURT PROCEEDINGS.

The Action was originally filed by Gross Seed on May 21, 2000. DOT and FHWA intervened in the District Court proceeding. Trial was held to the District Court commencing June 18, 2001, concluding June 26, 2001. During the trial, the District Court heard testimony from 11 witnesses and reviewed 174 Exhibits. Pet. App. at 15a-16a. Applying strict scrutiny, the District Court found that the Congressional basis for the DBE program under TEA-21 demonstrated a compelling interest. Pet. App. at 24a. The Court then turned to the second prong of the strict scrutiny analysis and found that the DBE program of TEA-21 was narrowly tailored. Pet. App. at 24a-26a. Finally, the Court concluded that NDOR need not independently establish that its program met strict scrutiny. Pet. App. at 27a.

3. THE EIGHTH CIRCUIT COURT OF APPEALS' REVIEW.

In a decision filed October 6, 2003, the Eighth Circuit, with the Honorable Chief Judge Loken presiding and joined by Judges Fagg and Murphy, affirmed the District Court's decision. With respect to the compelling governmental interest prong of the strict scrutiny analysis, the Eighth Circuit agreed with the Petitioner that it must, "[T]ake a hard look at the evidence, and we have done so." Pet. App. at 7a. After taking a hard look at the evidence, the Eighth Circuit concluded, "[T]hat Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated

by the Tenth Circuit in *Adarand II*, 228 F.3d at 1167-76." Pet. App. at 7a.

Turning to the second prong of the strict scrutiny analysis, the Eighth Circuit first addressed the facial challenge to the Federal DBE program using the narrow tailoring factors set forth in *United States v. Paradise*, 480 U.S. 149 (1987). The Eighth Circuit found that the regulations place strong emphasis on "the use of race-neutral means to increase minority business participation in government contracting" while at the same time the regulations prohibit the use of "quotas and severely limit the use of set-asides." Pet. App. at 11a. The Eighth Circuit then found that the revised DBE program has substantial flexibility. *Id*. The Court next found that the DOT has tied the goals for DBE participation to the relevant labor market. Pet. App. at 11a-12a. Finally, the Eighth Circuit found that Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program. Pet. App. at 12a. The Eighth Circuit concluded that the revised DBE program is narrowly tailored on its face.

The Eighth Circuit then turned to the narrow tailoring prong as applied. After considering the facts set forth above, the Eighth Circuit concluded that Gross Seed failed to prove that the revised DBE program was not narrowly tailored as applied by NDOR. Pet. App. at 14a.

The Eighth Circuit, like the District Court, rejected Gross Seed's challenge to TEA-21, the Federal DBE regulations and Nebraska's implementation of its DBE program, both facially and as applied.

4. MISSTATEMENTS IN PETITIONER'S WRIT OF CERTIORARI.

The Petitioner makes several assertions regarding admissions made by NDOR in discovery responses and through the testimony of Claude Oie, the head of NDOR's Construction Office which is also responsible for the administration of NDOR's Disadvantaged Business Program. Trial Tr. 575:17-22; Petitioner's Writ at 11, 22. However, a closer review of Mr. Oie's trial testimony presents a more balanced picture to correct these blanket assertions which may be construed as misstatements of fact under Supreme Court Rule 15.2. At trial, Mr. Oie testified that the effects of discrimination in the contracting community in Nebraska are brought out in the fact that outside of the program the DBE community does not get as much work as they do when there are program goals. Trial Tr. 622:21-24. Stated another way, Mr. Oie testified that the fact that there is an availability of DBE's not getting the work on state-funded projects would be an indication of some discrimination. Trial Tr. 621:7-24. NDOR's position on the DBE program is that it is a regulatory requirement from DOT and NDOR will do everything it can to meet 49 C.F.R. Part 26. Trial Tr. 620:40-8. Mr. Oie testified that pursuant to 49 C.F.R. Part 26, NDOR was not to look for specific instances of discrimination. Trial Tr. 601:1-17. NDOR did not direct MGT to look for specific instances of discrimination since Congress had decided there was discrimination and NDOR was required by 49 C.F.R. Part 26 to have a DBE program. Trial Tr. 604:1-8; 605:2-17.

Petitioner's blanket statements regarding the lack of discrimination evidence in the Nebraska contracting community is contradicted by the testimony at trial.

Further, NDOR complied specifically with DOT's directive that it was not required to look for specific instances of discrimination in the highway contracting community. The totality of the evidence at trial was sufficient to convince the Eighth Circuit that NDOR had met its narrow tailoring requirement as argued below.

REASONS FOR DENYING THE WRIT

I. GROSS SEED'S CLAIM FOR FORWARD-LOOKING RELIEF SHOULD BE DENIED BECAUSE IT CHALLENGES A FISCAL YEAR 2001 NEBRASKA DBE PROGRAM UNDER TEA-21 WHICH EXPIRED BY ITS OWN TERMS IN FEDERAL FISCAL YEAR 2003.

The Petition for Writ of Certiorari should be denied because Gross Seed is claiming forward-looking relief for NDOR's nearly three-year old DBE program under TEA-21, which itself expired automatically in Federal Fiscal Year 2003.[1]

The DBE program, both as it appears in 49 C.F.R. Part 26 and as implemented in the State of Nebraska, is limited in duration. TEA-21's DBE provisions expired automatically in Federal Fiscal Year 2003 unless Congress determines that reauthorization of the program is appropriate. *See*, TEA-21, Section 1101(a). This point was made explicitly in DOT's "Participation by Disadvantaged Business Enterprises in Department of Transportation

[1] Federal Fiscal Year 2003 began on October 1, 2002, and expired on September 30, 2003.

Programs; Final Rule," Federal Register, Vol. 64, No. 21, p. 5096-5148, February 2, 1999. In the Final Rule, under subtitle "Duration of Relief," DOT stated, "The TEA-21 DBE program will end in 2004 unless reauthorized by the Congress. In each successive reauthorization bill for the surface transportation and airport programs, Congress will have the opportunity to examine the current state of transportation contracting and determine whether the DBE program statutes are still necessary to remedy the continuing effects of discrimination." 64 F.R. 5103. Congress recently extended TEA-21's provisions a second time until April 30, 2004, pursuant to the Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, HR 3850, February 29, 2004, 118 Stat. 478 (2004). Under DOT's Final Rule, NDOR's current DBE program would end if TEA-21 is not reauthorized.

The Eighth Circuit placed great emphasis on the fact that TEA-21 is subject to periodic Congressional reauthorization. Pet. App. at 11a. Citing *Grutter v. Bollinger*, 123 S.Ct. 2325, 2376 (2003), the Eighth Circuit held that periodic legislative debate, "[a]ssure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of a goal of equality itself." Pet. App. at 11a. Thus, Petitioner cannot show that forward-looking relief would be warranted to challenge the DBE provisions of TEA-21 at issue given the pending Congressional debate over TEA-21's reauthorization.

In addition, each recipient of Federal funds from the DOT DBE program, including NDOR, must re-evaluate its overall goal annually to ensure that it adequately reflects local market conditions. 49 C.F.R. Part 26.45. This annual review further ensures that NDOR's DBE program is

appropriately limited and will not last longer than the discriminatory effects it is designed to eliminate. 49 C.F.R. Part 26.51(c)-(g). NDOR re-evaluated its overall goal and substantially reduced the race- and gender-conscious portion of its overall goal in the Fiscal Year 2001 program at issue. The evidence at trial shows that the goals contained in the Fiscal Year 2000 and 2001 versions of NDOR's DBE program were substantially different.[2] *See*, NDOR C.A. App. A66-A85, "Statement on the U.S. Department of Transportation's Approval of Nebraska Fiscal Year 2000 Disadvantaged Business Enterprise Program"; NDOR C.A. App. A85-A92, "Explanation for Approval FY 2001, Nebraska Department of Roads DBE Program Goal-Setting Process".

The regulatory framework makes it clear that NDOR's DBE program must be evaluated *annually* pursuant to 49 C.F.R. Part 26. Forward-looking relief is not appropriate to analyze NDOR's Fiscal Year 2001 DBE program, which is now nearly three years old and has been reviewed annually. Gross Seed's argument that it would be appropriate to seek forward-looking relief at this stage of the case is not supportable given TEA-21's sunset provisions and NDOR's annual review of its DBE program.

---

[2] NDOR's Fiscal Year 2000 began on July 1, 1999, and expired on June 30, 2000. NDOR's Fiscal Year 2001 began on July 1, 2000, and expired on June 30, 2001.

II. CONTRARY TO GROSS SEED'S ASSERTIONS, THERE IS NOT A SPLIT, BUT RATHER UNANIMITY IN THE CIRCUITS.

The Petition for Writ of Certiorari should be denied because there is no split in the United States Courts of Appeals.

Supreme Court Rule No. 10, in relevant part, states:

> A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.
>
> * * *
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in the way that conflicts with relevant decisions of this Court.

Gross Seed posits that review by this Court is appropriate to resolve conflicts among the United States Circuit Courts of Appeal. *See*, *Braxton v. United States*, 500 U.S. 344 (1991). However, there is no split, but rather unanimity, in the Circuit Courts of Appeal regarding the standards to be applied regarding the use of race and gender preferences in federal contracting programs.

First, Gross Seed cannot legitimately claim that there is a split in the circuits between the instant case and *Rothe Development Corp. v. United States Department of Defense*, 262 F.3d 1306 (Fed.Cir. 2001). *Rothe* dealt with a challenge to § 1207 of the National Defense Authorization Act of 1987 (the "§ 1207 program"), Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986). The § 1207 program allowed the United States Department of Defense to use preferences in the selection of bids by small businesses owned by socially and economically disadvantaged businesses ("SBD's"). No state program was implicated. The Federal Circuit concluded that the District Court improperly applied a deferential legal standard rather than strict scrutiny and improperly relied on post-enactment evidence. The Second Circuit reversed and remanded the case to the District Court for a determination under a strict scrutiny standard. *Id.* at 1329.

Here, there is no question that the Eighth Circuit conducted its analysis under the strict scrutiny standard while mindful of this Court's admonition that strict scrutiny is not always "fatal in fact." Pet. App. at 6a, citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995). With respect to the compelling interest prong of the strict scrutiny analysis, the Eighth Circuit took a "hard look" at the evidence before Congress and concluded that Congress, "had a strong basis in the evidence to support

its conclusion that race-based measures were necessary". Pet. App. at 7a. Citing *Rothe* itself, the Eighth Circuit held that Gross Seed failed to meet its ultimate burden that no compelling governmental interest existed. *Id.*

With respect to the narrow tailoring prong of the strict scrutiny analysis, the Eighth Circuit took issue with the District Court's analysis that NDOR "need not independently establish that its program meets strict scrutiny". Pet. App. at 27a. Rejecting this argument advanced by NDOR on appeal, the Eighth Circuit held:

> [A] valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to these parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Pet. App. at 8a-9a.

The Eighth Circuit then reviewed both the federal DBE program and NDOR's implementation concluding that Gross Seed failed to prove that the revised DBE program was not narrowly tailored. There is no split between the Eighth Circuit's decision here and the Federal Circuit's decision in *Rothe,* a case explicitly relied upon by the Eighth Circuit in establishing the appropriate standard of review.

Second, rather than a split, there is unanimity between the Eighth Circuit's decision here and the Tenth Circuit's decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. granted*, 532 U.S. 941, *writ dismissed*, 534 U.S. 103 (2001) ("*Adarand II*"). It is unquestioned that the Eighth Circuit followed the Tenth

Circuit's lead under both prongs of the strict scrutiny analysis. Without reaching the merits, this Court found that the Tenth Circuit's "strict scrutiny analysis relies almost exclusively on regulations designed to channel benefits, through States and localities, to firms owned by individuals who hold themselves out to be socially and economically disadvantaged." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001).

The Eighth Circuit, like the Tenth Circuit, found that the programs implemented by TEA-21 and 49 C.F.R. Part 26 to channel benefits through the States to the DBE community were constitutional under this exacting review. The Eighth Circuit further extended this exacting review to NDOR's implementation of its DBE program.

Rule 10's admonition that this Court's discretion in granting certiorari will be exercised sparingly without a split within the United States Courts of Appeal has not been met.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

STEPHEN D. MOSSMAN*
J.L. SPRAY
Special Assistant Nebraska Attorneys General
MATTSON, RICKETTS, DAVIES, STEWART & CALKINS
134 South 13th Street, Suite 1200
Lincoln, NE 68508
(402) 475-8433

JEFFERY T. SCHROEDER
Nebraska Assistant Attorney General
1500 Highway 2
P.O. Box 94759
Lincoln, NE 68509-4759
(402) 479-4611

**Counsel of Record*

Counsel for Respondents Nebraska Department of Roads and John L. Craig